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OFFICE OF THE SECRETARY

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JOHN WELLS KING
ADMITTED IN VA. AND D.C.

August 30, 1993

OUR FILE NO.
1158-101-63

William F. Caton, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-91
RM Nos. 8197, 8279
Berlin *et al.*, Wisconsin

Subject: Opposition of Markesan Broadcasting Company

Dear Mr. Caton:

On behalf of Mark J. Kastein d/b/a Markesan Broadcasting Company, I transmit herewith the original and four copies of its Opposition Of Markesan Broadcasting Company To "Statement For The Record And Motion To Strike" in the above-referenced proceeding.

Any questions may be communicated directly to this office.

Yours very truly


John Wells King

JWK/jb

Enclosures

cc: Michael C. Ruger, Chief
Ms. Kathleen Scheuerle
Richard J. Hayes, Jr., Esquire
Jerold L. Jacobs, Esquire
Julie A. Blaser

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AUG 30 1993

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Before The

Federal Communications Commission

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)	Docket No. <u>93-91</u>
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	RM Nos. 8197, 8279
FM Broadcast Stations)	
(Berlin, De Forest, Wautoma, and)	
Markesan, Wisconsin)	

TO: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

OPPOSITION OF MARKESAN BROADCASTING COMPANY
TO "STATEMENT FOR THE RECORD AND MOTION TO STRIKE"

On August 6, 1993, De Forest Broadcasting Company, through counsel, filed with the Commission a document entitled "Statement for the Record and Motion to Strike" (referred to herein as the "Statement and Motion"), directed to the July 15, 1993, Reply Comments filed herein by Mark J. Kastein, d/b/a Markesan Broadcasting Company ("Kastein"). Kastein, by his attorney, herewith opposes that Statement and Motion, by stating as follows:¹

¹ Counsel for Kastein did not receive the De Forest Pleading until August 19, 1993. It was not served on counsel at the address shown in Kastein's Reply Comments filed herein on July 15, 1993, but instead was mailed to counsel's former address. Accordingly, Kastein has requested additional time in which to respond to the Statement and Motion.

The Statement and Motion Should Be Stricken As Unauthorized

Section 1.415 of the Commission's Rules specifies the documents to be filed in a rule making proceeding. They are (1) comments, and (2) reply comments. Subsection (d) provides:

No additional comments may be filed unless specifically requested or authorized by the Commission.

The Statement and Motion contains "additional comments" within the meaning of the rule. It was not specifically requested, nor is it authorized, by the Commission. The Commission does not accept such pleadings.² Accordingly, the Statement and Motion should be stricken as unauthorized.

The Statement and Motion Attempts To Cure De Forest's Failure To File Timely Comments

For whatever reason, De Forest declined to file comments in response to the Public Notice announcing the acceptance of Kastein's Markesan proposal (the "Public Notice").³ Its silence on the Markesan proposal ought now, in the interest of fairness to the other parties in the proceeding, to be held against it. The comment deadline in this round of the proceeding was July 15, 1993, as announced in the Public Notice. The Commission should not sanction De Forest's tactic of laying in wait to see what comments were filed by the deadline prescribed by the Commission, then filing unauthorized comments thereon. De Forest's

² See, for example, *Campbellsville and Mannsville KY*, 8 FCC Rcd 2880 n. 2 (MMB 1993).

³ *Petitions for Rulemaking Filed*, Report No. 1949, June 30, 1993. See Attachment A hereto.

conduct reflects a either a miscomprehension or misuse of the Commission's processes.⁴

**Kastein's Reply Comments Were Timely And Duly Filed,
And Caused De Forest No Prejudice**

The Statement and Motion places great reliance on the fact that the title of Kastein's July 15, 1993, filing is "Reply Comments," arguing that they were unauthorized and improperly filed. This is simply not true.

The Public Notice *specifically* advises:

Reply Comments to this counterproposal should be submitted in this docket no later than 15 days (rather than within 30 days) after the date of this Public Notice.

(Emphasis added.) Kastein followed the requirements of the Public Notice. He was no less entitled to file reply comments than was De Forest.

Since the Public Notice announced that it was accepting Kastein's Markesan proposal as a counterproposal to the proposed De Forest allotment, it was incumbent upon Kastein, as advocate for the Markesan allotment, to state in his Reply Comments why he believes Markesan should be favored over De Forest. The Reply Comments do not constitute, as De Forest argues, an "entirely new counterproposal." They are not rendered defective by the inclusion of material regarding coverage and market and community data. Indeed, the Reply Comments are intended to ensure a complete record of this proceeding, and were entirely within Kastein's right and discretion to make.

⁴ De Forest admits that it is not entitled to respond to Kastein's July 15, 1993, Reply Comments. Statement and Motion, at 4.

De Forest was not deprived of an opportunity to comment upon a Markesan allotment. It could have filed reply comments on or before the July 15, 1993, deadline established by the Commission, as Kastein did. Because the Commission limits the pleading cycle on a counterproposal to reply comments only, De Forest had no right to respond further to Kastein's Reply Comments, just as Kastein would have had no right to respond to De Forest's reply comments, had it filed them.

**Kastein's Technical Proposal Adequately Establishes
The Superior Need For Service At Markesan**

If the Commission determines to place the Statement and Motion in the record of this proceeding, then Kastein offers the following brief comments in response.

Kastein demonstrated in his Reply Comments the woeful underservice that the Markesan area presently suffers. The engineering showing accompanying the Reply Comments defined areas that would be served by a Markesan facility which are presently without any 3.16 mV/m service whatsoever. This was the frame of reference for Kastein's observations regarding white areas that would be served.

De Forest's contentions regarding existing service to Markesan and to De Forest, as well as its other criticisms, are addressed in the attached engineering statement of Kastein's communications consultant, Lyle Robert Evans. None of them warrants the relief that De Forest requests.

Accordingly, the Commission should disregard the Statement
For the Record and Motion To Strike.

Respectfully submitted,

MARK J. KASTEIN, D/B/A
MARKESAN BROADCASTING COMPANY

By


John Wells King

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

August 30, 1993



PUBLIC NOTICE

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

News media information 202/632-8080. Recorded listing of releases and texts 202/632-0002.

33773

REPORT NO. 1949

June 30, 1993

ASSOCIATE MANAGING DIRECTOR
PUBLIC INFORMATION AND REFERENCE SERVICES
PETITIONS FOR RULEMAKING FILED

RM No.	Rules Sec.	Petitioner	Date Rec'd	Nature of Petition
8279*	73.202(b)	Markesan Broadcasting Company (Filed by Mark J. Kastein d/b/a Markesan Broadcasting P.O. Box 82 Brandon, WI 53919)	06/10/93	Request Amendment FM Table of Allotments to allocate Ch. 284A to Markeswan, WI at coordinates 43-43-53; 89-01-24.

*THE ABOVE PETITION FOR RULEMAKING WILL BE TREATED AS A COUNTERPROPOSAL IN MM DOCKET NO. 93-91. REPLY COMMENTS TO THIS COUNTERPROPOSAL SHOULD BE SUBMITTED IN THIS DOCKET NO LATER THAN 15 DAYS (RATHER THAN WITHIN 30 DAYS) AFTER THE DATE OF THIS PUBLIC NOTICE.

HILEY RACER & POTTS

ATTACHMENT A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN THE MATTER OF:

AMENDMENT OF SECTION 73.202(B),)	MM DOCKET NO. 93-91
TABLE OF ALLOTMENTS,)	RM-8197
FM BROADCAST STATIONS,)	RM-8279
(BERLIN, DE FOREST AND MARKESAN, WI)	

TO: THE COMMISSION

ENGINEERING STATEMENT

This Engineering Statement concerns the above captioned Petition For Rule Making; MM Docket Number: 93-91, RM-8279.

Markesan Broadcasting Company ("MBC"), retained the services of Lyle Robert Evans, Technical Consultant, to conduct engineering studies and prepare necessary Statements to be incorporated in Opposition Of Markesan Broadcasting Company To "Statement For The Record and Motion To Strike".

De Forest Broadcasting Company concludes: 1.) The MBC proposal does not provide first or second aural service to any service area. 2.) The community of Markesan, WI receives five (5) aural services, not one (1) as claimed by MBC. 3.) MBC incorrectly based their FM service to Markesan, WI on 70 dBu service and completely omitted any contributions from AM facilities for all calculations.

De Forest further alleges MBC's claims are based

on incorrect engineering analysis.

MBC did omit the contributions of Standard Broadcast (AM) Stations WMRH, Waupun, and WCWC Ripon, both Wisconsin, from calculations.

Field strength measurements of Station WMRH and WCWC signals, conducted in accord with 47 Code of Federal Regulations, §73.153 and §73.186, reveal the 5.0 mV/m service contour of Station WMRH falls short of Markesan. Measurements of the Station WCWC, Ripon signal show the 5.0 mV/m contour encompasses Markesan, falling 4.2 kilometers short of the calculated 5.0 mV/m contour displayed by De Forest Broadcasting Company.

Markesan receives this WCWC 5.0 signal only during daylight hours, which in December are 7:15 am to 4:15 pm, local time.

MBC stated facts to the Commission, stating exactly what it intended. More than 2,000 Markesan area residents shall receive a first 70.0 dBu (3.16 mV/m) "Principal Community" FM service; 1,893 persons if the calculated "daytime" 5.0 mV/m WCWC service contour is considered.

Markesan receives "Interference-Free" FM service only from Station WPRK, Omro, Wisconsin. The calculated, presumed 54 dBu (0.5 mV/m) of Station WOLX does not encompass Markesan. It is this presumed facility that must be considered in Rule Making proceedings.

With Station WOLX, Baraboo, Wisconsin, operating with assumed maximum Class B FM Station facilities, more than 3,000 persons residing Northwest of Markesan shall receive a second "Interference-Free" FM service.

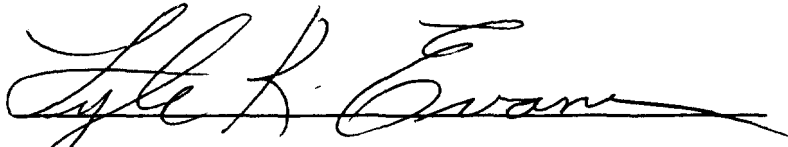
Exhibit E-1 of the De Forest Engineering Statement displays a "Reference Contour" for Wautoma, Wisconsin. This contour is not relative. A Construction Permit issued to Wautoma Radio Company authorizes construction of a new FM Broadcast Station, operating on Channel 226A, at Wautoma, Wisconsin, FCC File Number: BPH-880421N2. The authorized Wautoma station 1.0 mV/m contour falls far short of that displayed by De Forest. A copy of the Wautoma, station contour map filed with the FCC is attached.

De Forest references a pending Application of Station WYUR(FM), Ripon, Wisconsin, for improved facilities. This Application, FCC File Number: BPH-900412IC, is ungrantable in its present form as the facilities proposed cause interference to relating stations.

It is believed the De Forest statements originate from a lack of understanding of the technical facts presented in the Markesan "Counterproposal" and subsequent "Reply Comments".

This Report was prepared by me personally and all facts contained herein are true of my personal knowledge or belief, and on such statements made on belief, they are believed to be true.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lyle R. Evans", written over a horizontal line.

Lyle R. Evans,
Technical Consultant to:
Mark J. Kastein d/b/a
Markesan Broadcasting Company

August 26'th, 1993

ENGINEERING STATEMENT; CONCLUDED

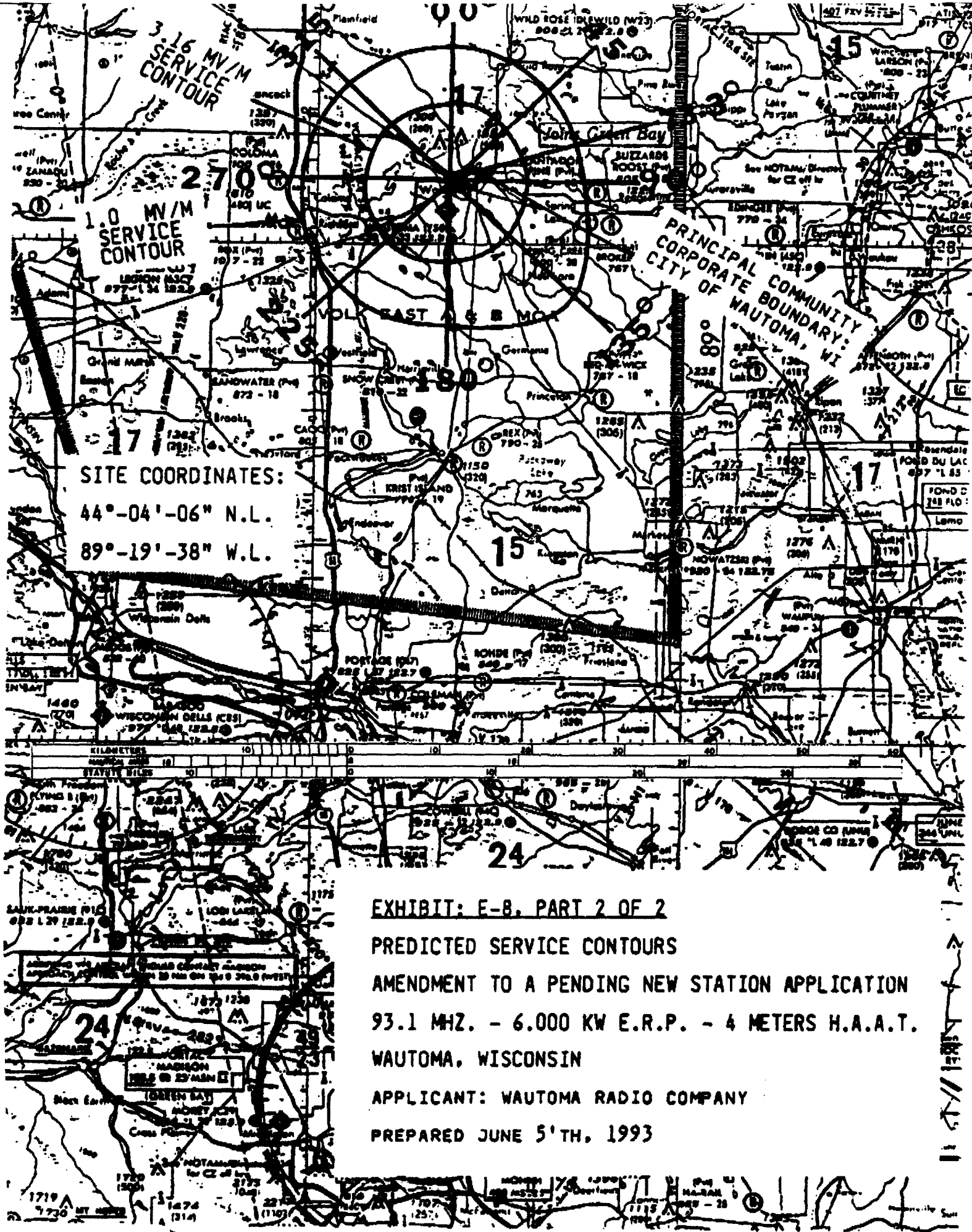


EXHIBIT: E-8. PART 2 OF 2

PREDICTED SERVICE CONTOURS

AMENDMENT TO A PENDING NEW STATION APPLICATION

93.1 MHZ. - 6.000 KW E.R.P. - 4 METERS H.A.A.T.

WAUTOMA, WISCONSIN

APPLICANT: WAUTOMA RADIO COMPANY

PREPARED JUNE 5'TH, 1993

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

**Michael C. Ruger, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8318
Washington, D.C. 20554**

**Ms. Kathleen Scheuerle*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8314
Washington, D.C. 20554**

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Counsel For DeForest Broadcasting Company**

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Washington, D.C. 20036
Counsel For Kingsley H. Murphy, Jr.**



Jennifer J. Britt

August 30, 1993